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In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 266

MERRITT-CHAPMAN & SCOTT CORPORATION,
Appellant,

vs.

BERNICE M. FRAZIER,
Appellee.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief for Respondent in Opposition

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ARGUMENT

I.

Petitioner urges that the court below did not give proper effect to respondent's technical failure to file a timely petition for rehearing with the Industrial Commission of Arizona within twenty days following the Commission's award of December 3, 1957. There is no dispute that within the twenty-day period, respondent did file an "Election of Remedies" form. In effect, petitioner simply takes the posi-

tion that respondent filed the wrong piece of paper and is thereby barred.

The record unmistakably demonstrates that during the twenty days following the award of December 3, 1957, the Industrial Commission was notified of the possibility of a third party action (R. 18-19). The record also demonstrates that the Industrial Commission treated the matter as open and when the "Election of Remedies" was filed (R. 42), the Commission then entered an order suspending the award (R. 46). The court below properly recognized that the Industrial Commission accepted and dealt with the "Election" as an application for rehearing. If there was a formal defect, the Commission certainly had the power to waive such defect and did. *Nolasco v. Borden Co.*, 69 Ariz. 277, 212 P.2d 999 (1950).

Petitioner contends that on this subject the Court of Appeals adopted "a new theory that was neither urged nor argued". This was petitioner's contention in its Petition for Rehearing to the court below. The fact is that exhaustive treatment was given to this subject as is indicated by reference to the first three sections of Appellant's Opening Brief to the court below, the first section of Appellee's Brief and the first section of Appellant's Reply Brief. Indeed, the specific point that the "Election" form, in lieu of a formal application for rehearing, preserved the jurisdiction of the Commission, and was deemed by the Commission to so preserve its jurisdiction, was raised and presented both in oral argument to the court below and in the briefs. See, for example, Appellee's Brief, page 11.

We respectfully submit that petitioner's position on the merits of this question is untenable. It should also be pointed out that this Court has repeatedly ruled that certiorari will not be granted except in cases involving prin-

ciples, the settlement of which is important to the public, as distinguished from that of parties, and in cases where there is a real and embarrassing conflict of opinion and authority between Courts of Appeal. See, e.g., *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70 (1955). Such is certainly not the case here.

II.

Petitioner's next contention is that the issues of contributory negligence and assumption of risk should have been submitted to the jury. More specifically, petitioner urges that Article 18, Section 5, of the Arizona Constitution makes the jury the sole judge of these defenses and that by taking the issues from the jury, the petitioner was denied its constitutional right. It should be emphasized that the Arizona Constitution does not require the trial court to submit the issues of contributory negligence or assumption of risk to the jury when there is no evidence to support these defenses.* The trial judge ruled that there was no such evidence after listening to all of the proceedings, observing all of the witnesses, reviewing all of the testimony and careful and judicious consideration. His ruling was confirmed by the Court of Appeals. This Court has held that it will not enter upon a minute analysis of the evidence when it is the concurrent judgment of the District Court and the Circuit Court of Appeals that the evidence fails to support the petitioner's contentions. *Kelly v. Everglades Drainage Dist.*, 319 U.S. 415 (1943); *U.S. v. Johnston*, 268 U.S. 220 (1925); *Bochmer v. Pennsylvania R.R. Co.*, 252 U.S. 496 (1920). No further canvassing of this issue would seem indicated.

*See Opinion of Court Below, footnote 11.

III.

Petitioner next contends that the verdict below was monstrous. Petitioner's position is based on a cold analysis of the decedent's earnings without taking into account, not only the uncontradicted evidence that his income was rising, but, more important, without regard to other substantial elements of damage properly instructed upon by the trial court under the Arizona Wrongful Death Statute, such as loss of companionship, comfort, guidance and counsel, to name just a few. These elements are, of course, peculiarly within the discretion of the jury and trial judge. The court below held that the trial court did not abuse its discretion in its ruling upon the award. Now petitioner asks this Court to review the evidence on damages despite the concurrent judgment of the District Court and the Circuit Court of Appeals upholding the award. That this is not the function of the Supreme Court on petition for certiorari is supported by the authorities cited immediately above, which condemn requests to rehash the evidence adduced at the trial level.

IV.

Finally, petitioner assigns the failure below to stay these proceedings pending determination of a suit filed in the Arizona State Court. It should be first pointed out that the issues tendered in the State Court action were first presented to the Federal District Court. Only after an adverse decision by the Federal District Court did petitioner bring the State Court action. Having first invoked the federal jurisdiction, we submit that petitioner should not now be heard to complain that the Federal Court didn't stay the proceedings pending petitioner's "second shot" in the State Court.

The court below, in its opinion, properly pointed out that the mere fact that a Federal District Court, in the exercise of its diversity jurisdiction, is obliged to make decisions based upon an interpretation of State law is not alone sufficient ground for declining jurisdiction. (Opinion of Court Below, Petitioner's Appendix, page 8). In this connection, the court pointed out further that a stay of proceedings might be indicated, under special circumstances, to enable a party to secure from a State Court a definitive answer to questions involving State law. The special circumstances which would merit a stay include problems of constitutionality or compelling considerations of policy. Just as the court below pointed out that such "special circumstances" were not present so as to compel a stay of proceedings, we would point out that similarly these "special circumstanes", which are also a condition precedent to a grant by this Court of certiorari, continue to be absent.

Petitioner parades fancied horrors which allegedly will follow a denial of its application for certiorari. This parade of horrors assumes that respondent will apply for industrial compensation, that such application will be granted, that the Commission will then file a subrogation action against the petitioner and that all of these proceedings will be upheld by courts of competent jurisdiction. None of these contingencies have as yet arisen. Indeed, to the contrary, respondent has repeatedly stated on the record that she has no intention, nor does she feel she has any right, to apply for an industrial award, having elected to pursue her third party remedy. This Court has repeatedly ruled that it will not decide constitutional issues which are hypothetical in advance of the necessity for deciding them. See, e.g., *Asburn Hospital v. Cass County*, 326 U.S. 207, (1945); *Barker Printing Co. v. Local No. 731*, 281 U.S. 462 (1930).

As part of this ground, petitioner raises the question of the constitutionality of Arizona's Wrongful Death Statute, A.R.S. Section 12-613. The question of the constitutionality of this statute was nowhere and at no time presented to the court below. This Court will not ordinarily decide questions on certiorari not dealt with by the Circuit Court of Appeals. *U.S. v. Fleischman*, 339 U.S. 349 (1950); *Huddleston v. Dwyer*, 322 U.S. 232 (1944); *Owens v. Union Pac. R. Co.*, 319 U.S. 715 (1943), cert. den., 323 U.S. 740; *Sonzinsky v. U.S.*, 300 U.S. 506 (1937).

CONCLUSION

It is, therefore, respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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